TEOH NG CHOON & ORS. v. PUBLIC PROSECUTOR; And CHAI AH GIOH v. PUBLIC PROSECUTOR

[A. Cr. J. (Hill J.) February 16, 1955]

[Alor Star — Criminal Appeals Nos. 91 & 97 of 1954]

Gaming — Common Gaming Houses Ordinance, 1953, s. 4(1)(c) — Expert evidence — Use by Magistrate of his knowledge and experience.

Where the evidence given by an expert falls short of the ideal requirements, the Court of Appeal should consider whether the Magistrate has or has not carefully and properly used his own knowledge and experience in arriving at his decision.

In the first of the above appeals it appeared that the Magistrate had been careful to form his own opinion and had come to his own conclusions with the assistance of the expert's evidence and the convictions were upheld.

In the second of the above appeals however it appeared that the Magistrate had merely adopted the inadequately explained opinion expressed by the expert witness and therefore the conviction was quashed.

Cases referred to:—

(1) *Sim Ah Song & anor. v. Rex* (1951) M.L.J. 150.

(2) *Public Prosecutor v. Lee Eee Teong* (1953) M.L.J. 244.

MAGISTRATE'S CRIMINAL APPEALS.

Lim Kheng Kooi for the appellants in Cr. App. No. 91 of 1954.

Ng Jit Geow for the appellant in Cr. App. No. 97 of 1954.

F. G. Cooke (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Hill J.: — The appellants in these two appeals were convicted of offences of assisting in carrying on public lotteries contrary to section 4(1)(c) of the Common Gaming Houses Ordinance No. 26 of 1953.

As these two appeals have a common ground of appeal it will be convenient if I deal with them together.

In *Sim Ah Song & anor. v. Rex*[1] and *Public Prosecutor v. Lee Eee Teong*[2], Brown Ag. C.J. and Thomson J. laid down the principles relating to the evidence of expert witnesses in this type of case. With these decisions I am, of course, in full agreement but I have certain reservations resulting from my own not inconsiderable experience in similar circumstances and trials as a Magistrate in other countries and on what I can only call common sense and I propose now to explain and apply them.

It happens to be a fact that where an efficient, careful and experienced Magistrate is trying one of these cases the evidence of the expert witness, particularly when the case is straightforward, may become little more than a mere legal formality. Indeed, the Magistrate may well know as much as or more than the expert.

In such circumstances, to apply rigorously and strictly the full requirements referred to above seems to me not only unnecessary, but to be fundamentally wrong in denying to a Magistrate the use and benefit of his own knowledge and experience. Something one expects him to bring to bear on all other cases that come before him.

Few Magistrates indeed should need an expert to tell them that a pack of playing cards is not just 52 meaningless pieces of cardboard, though many might need an expert to advise them which card was "Mossy Face" or the "Curse of Scotland". And it seems to me that a similar situation, though perhaps to a lesser degree, can arise with regard to expert evidence relating to tickets, record of stakes and so on in the 100 and 1,000 numbers lotteries.

In my opinion a Court of Appeal in dealing with appeals of this nature should go beyond mere consideration of the formalities in the expert's evidence and, if this evidence falls short of the ideal requirements, consider whether the Magistrate has or has not carefully and properly used his own knowledge and experience in arriving at his decision.

Counsel in both the appeals under review criticised the expert's evidence as falling very short of the usual requirements with regard to detailed explanations of the exhibits. I agree that fuller explanations and reasons for the opinions expressed could and should have been given in each case.

In Criminal Appeal No. 91/54, however, I consider that the shortcomings in the expert's evidence were more than compensated for by the able manner in which the trial Magistrate dealt with the case. He asked certain pertinent questions of the expert regarding the exhibits and it is clear from his careful and well reasoned written judgment that he was careful to form his own opinion and come to his own conclusions with the assistance of the expert's evidence.

In these circumstances I am not prepared to interfere with the convictions. The fines against the second and third appellants of $2,000 each in respect of the second charge are, however, reduced to $1,000 each in default five months imprisonment, as they are both first offenders.

The position is very different with regard to Criminal Appeal No. 97/54. Here the Magistrate merely adopted the inadequately explained opinions expressed by the expert witness, it does not appear that he even took the trouble to examine the exhibits and

he merely states in his written judgment that the Chinese Affairs Officer gave evidence and proved that the exhibits related to 100 and 1,000 character lotteries.

I can only conclude that he quite failed to appreciate his duty to make up his own mind and in the result the appeal must be allowed and the conviction and sentence quashed.

Order accordingly.

Solicitors for the appellants: *Lim Kheng Kooi; Conaghan, Wreford & Thornton.*

PUBLIC PROSECUTOR v. TAN KENG SIEW

[A. Cr.. J. (Buhagiar J.) March 11, 1955]

[K. L. — Criminal Appeal No. 8 of 1955]

Merchandise Marks Ordinance, 1950, ss. 11, 12 and 19 — Meaning of trade mark or property mark — Meaning of "Trade Description" — Admissibility of evidence obtained as a result of illegal search.

This was an appeal by the Public Prosecutor against the decision of the learned President of the Sessions Court Kuala Lumpur. At the trial the prosecution sought to bring four charges against the respondent — two under s. 11 of the Merchandise Marks Ordinance for being in possession of a false trade mark namely the "Excide" Trade Mark and two under s. 19 of the Ordinance for being in possession of goods to which the false trade description of "Silver Excide" had been applied. The learned President refused to allow the two amended charges under s. 11 of the Ordinance as he held that that section related to the possession of detachable marks such as labels or plates which are to be fixed on goods and not to marks embossed on goods, as in this case. The learned President acquitted the respondent on the charges under s. 19 of the Ordinance as he held that the word "Excide" did not denote a false trade description.

Held: (1) there was nothing in the Merchandise Marks Ordinance which restricts the meaning of trade or property mark to detachable marks such as labels or plates which can be affixed to the goods and the learned President was therefore wrong in holding that the mark in this case was not a trade mark; (2) the term "Silver Excide" in this case did not come within the definition of a "trade description".

Semble: The exhibits seized in this case were admissible notwithstanding that the provisions of s. 28(1) of the Merchandise Marks Ordinance relating to search were not complied with.

Cases referred to:—

(1) *Fowler v. Cripps* (1906) 1 K.B. 16, 20.

(2) *Cameron v. Wiggins* (1901) 1 K.B. 1.

(3) *Watson v. Dr. Jaegar's Sanitary Woollen System Co.* 13 T.L.R. 150.

(4) *Wong Liang Nguk v. Public Prosecutor* (1953) M.L.J. 246.

(5) *Karuma v. Regina* "The Times" December 9, 1954; (1955) 2 W.L.R. 223.

MAGISTRATE'S CRIMINAL APPEAL.

J. P. Kirby (Federal Counsel) for the appellant.

K. C. Chia for the respondent.

Cur. Adv. Vult.

Buhagiar J.: — The respondent was originally charged at the Sessions Court, Kuala Lumpur, as follows:—

"That you on the 12th day of August, 1954, at No. 320 Batu Road, Kuala Lumpur, in the State of Selangor, did sell certain goods, to wit, Excide Batteries with counterfeit trade marks, and thereby committed an offence punishable under Section 12 of the Merchandise Marks Ordinance 10/50."

At the commencement of the trial four fresh charges were substituted for the original charge; those charges were as floows:—

1st Charge: That you on the 12th August, 1954 at 320 Batu Road, Kuala Lumpur, in the State of Selangor, had in your possession a trade mark, namely the "EXCIDE" Trade Mark, for the purpose of denoting that goods, namely batteries, were the manufacture of Chloride Batteries Ltd., when they were not, and thereby committed an offence punishable under Section 11 of the Merchandise Marks Ordinance, 1950.

2nd Charge: That you at the same time and place sold to one M. A. Jones, goods, namely a battery, to which a false trade description had been applied in that the said battery was described as being a "SILVER EXCIDE" battery when it was not, and thereby committed an offence punishable under Section 19 of the Merchandise Marks Ordinance, 1950.

3rd Charge: That you on the 17th day of August, 1954, at 320 Batu Road, Kuala Lumpur, in the State of Selangor, had in your possession a trade mark, namely the "EXCIDE" Trade Mark, for the purpose of denoting that goods, namely, batteries were the manufacture of Chloride Batteries Ltd., when they were not and thereby committed an offence punishable under Section 11 of the Merchandise Marks Ordinance, 1950.

4th Charge: That you, at the same time and place, had in your possession for the purpose of trade, goods, namely batteries, to which a false trade description had been applied, namely the description of "SILVER EXCIDE" and thereby committed an offence punishable under Section 19 of the Merchandise Marks Ordinance, 1950.

The learned President declined to allow the first and third charges and having heard the case for the prosecution on the second and fourth charges acquitted and discharged the respondent without calling upon him for his defence.

The learned President did not allow the first and third charges because, as he stated in his grounds of judgment a charge under this section (section 11 of the Merchandise Marks Ordinance, 1950) clearly related to a trade mark or property mark itself and not the goods. The words "has in his possession a trade mark or property mark for the purpose of denoting that any goods etc., clearly relate to possession of detachable marks such as labels or plate which are to be fixed on to goods."

With regard to the second and fourth charges the learned President held that the word "Excide" did not denote a false trade description.

The Public Prosecutor appealed against this decision on the following grounds:—